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In Praise of Martyrdom?

Mark Tushnet†

In this brief Response, Professor Tushnet describes Professor Carter's position as a theologically grounded critique of accommodations of religion. He elaborates that critique by exploring several ways in which accommodations of religion threaten religious people and institutions that accept them, even voluntarily.

I am pleased to welcome Professor Carter to the (unfortunately thin) ranks of skeptics about the entire project of defending the propriety of accommodations of religion.¹ There are, of course, some skeptics whose concerns arise from a quite general strict separationist view of the Constitution. But Professor Carter joins a different group, those with essentially theological rather than constitutional concerns about accommodations of religion. In this brief Response, I will elaborate somewhat on what I take to be the theological case against accommodation.²

We can begin by distinguishing between two kinds of concerns. The first is that accommodations are bad for religions, the second, that they operate in a domain that religion ought to understand as irrelevant to itself.

The concern that accommodations are bad for religion rests largely on historical experience that demonstrates (to those who have this concern) that the State is not religion's friend,³ even when it superficially appears to be.⁴ I believe that the historical argument underlies much of the

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1. For my earlier discussions of the issue, see Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691 (1988); Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. REV. 117 [hereinafter Tushnet, *Rhetoric of Free Exercise*]; Mark Tushnet, *The Underside of Mandatory Accommodations of Religion*, 26 CAP. U. L. REV. 1 (1997); Mark Tushnet, *Will Context-Dependent Balancing Do the Job We Want Done?*, CONN. L. REV. (forthcoming 1999) [hereinafter Tushnet, *Context-Dependent Balancing*].

2. I focus on the accommodation issue because, as Professor Carter points out, it is the area of most current interest. I note, however, that Professor Carter's strictures on the "neutrality" analysis track rather closely some critiques of the Court's disparate impact jurisprudence more generally, in such areas as free expression, equal protection, and the dormant commerce clause.

3. Throughout, I capitalize *State* to emphasize that I am here concerned with all forms of worldly government, not merely the government of the United States or of any of its components.

4. One thinks here of Shakespeare's observation that a person "may smile and smile and be a villain." WILLIAM SHAKESPEARE, *HAMLET*, act 1, sc. 5.

separationist impulse expressed in traditional Jewish and Baptist thinking about establishments of religion. Here I identify two aspects of the historical argument with the aim of showing that the historical argument, while not insubstantial, will not in the end sustain the weight of a full-fledged anti-accommodationist conclusion.

First, one might be concerned that the State is not religion's *permanent* friend. That is, no matter what accommodations the State presently provides, in the long run, religions now benefiting from accommodations will find the State turning against them. As Professor Carter suggests, accommodations always have some limits, and a religion that has grown accustomed to having its concerns accommodated may be particularly disappointed when it presses its concerns beyond the limits the State is willing to recognize.⁵ Still, one might think that short-term or interim benefits of accommodations are better than none at all. No matter how small the domain in which the State is religion's friend, and no matter how briefly it may be so, still, within that domain and for that period, religion is better off than it would be had the State never been religion's friend in any way.

This conclusion might be too hasty, however. Difficulties arise in two directions. As I have mentioned, believers may be disappointed when the State's accommodations reach their limit, and that disappointment may be more damaging to their belief than living with the knowledge that the State will *never* accommodate their beliefs and practices. From the State's side, accommodations of religion may make it too easy to overlook the harm done when it denies an accommodation. The best example in the constitutional law of accommodations is Justice O'Connor's opinion in the peyote case.⁶ She rejected the Court's position that neutral laws of general applicability were constitutionally permissible without regard to their impact on religious exercise, and would have required that such laws promote a compelling state interest in an appropriately well-defined way.⁷ But, she concluded, the government in the peyote case did have a compelling interest in suppressing psychoactive drugs, which would be advanced by barring the use of peyote in religious exercises.⁸ Here Justice O'Connor presents herself as a friend of religion, but when asked to take religion's claims seriously, she instead finds the State's interests more compelling. And the mere possibility that in some other case she would require the government to accommodate religious belief and practice allows her to take comfort in thinking that she is, after all, a humane person who would not uphold unnecessary state intrusions on religious exercise.⁹

5. See Stephen L. Carter, *Religious Freedom as if Religion Matters: A Tribute to Justice Brennan*, 87 CALIF. L. REV. 1059, 1071 (1999).

6. See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990).

7. See *id.* at 903-07 (O'Connor, J., concurring in the judgment).

8. See *id.*

9. For additional comment, see Tushnet, *Rhetoric of Free Exercise*, *supra* note 1.

Second, religion may find accommodations seductive. Because they rarely come with no strings attached,¹⁰ some religious institutions will find the benefits of accommodations so attractive that they will change to accommodate public demands.¹¹ And yet, as Professor Carter points out, there can be no objection from within religion to religious change, even change induced by the availability of public benefits.¹² Religions necessarily negotiate their way through the non-religious world, and they are inevitably changed as they do so. Changes induced by the availability of accommodations are no different, and no more troubling, than changes induced by the existence of television or automobiles.¹³

Here I have a quibble with Professor Carter's presentation, perhaps more with one aspect of his formulation than with his broader point. As he has elsewhere, Professor Carter emphasizes religion's role in opposition to, and as subversive of, claims of State authority.¹⁴ Accommodations of religion induce religious change by providing incentives to alter religious practice so as to make the accommodation available. Yet introducing the language of incentives may be misleading if it suggests, as Professor Carter does at one point, that we ought to worry about the incentives religion has to subvert state authority.¹⁵ Such a formulation has inappropriate consequentialist overtones. Religion's subversive potential is not a matter of incentives, of actions taken in response to options made available. A person who truly believes cannot—simply cannot—be induced to change his or her beliefs.¹⁶ Critics of State actions that impose costs on religious exercise

10. For example, to receive the teaching assistance from public school teachers made available to religiously affiliated schools in New York by the Court's decision in *Agostini v. Felton*, 521 U.S. 203 (1997), regulations required the schools to remove all religious symbols from the classrooms in which the public school teachers work. *See id.* at 211, 234-35.

11. In any event, even devoting time to considering whether to accept the accommodation with its strings reduces the time the institution has to act as a religion, for example, by providing pastoral counseling. For a somewhat more extended analysis, see Tushnet, *Context-Dependent Balancing*, *supra* note 1.

12. *See Carter, supra* note 5, at 1074. I note the possibility that *some* strings might be challenged, and perhaps invalidated, as unconstitutional conditions. The law of unconstitutional conditions is notoriously murky, and, in any event, some strings surely will be upheld, which is sufficient to sustain my general analytic point.

13. I have in mind here the transformations that have occurred in denominations like the Amish and the Mennonites. Professor Carter's example of the Mormon adaptation to governmental pressure (to put it far more benignly than may be appropriate) to abandon polygamy is another such transformation. And, as he stresses, that transformation occurred from within the religion; it resulted from a revelation of the sort to which the religion itself gave normative weight.

14. *See Carter, supra* note 5, at 1060.

15. *See id.*

16. This is not to say that truly held religious beliefs cannot change, only that they cannot change by the operation of incentives; they can change through the methods that each religion acknowledges as a basis for belief (revelation or reasoning, for example). And I suppose there may be religions with beliefs that allow for religious change in response to external incentives, whether positive or negative. For those religions, the problems I address here would not arise. But I do wonder whether there are many religious people who would acknowledge that their religious beliefs are of this sort.

note the harm that occurs when a believer responds to negative incentives by altering his or her religious beliefs.¹⁷ Exactly the same harm occurs when believers respond to the positive incentives made available by accommodations of religion, or by the possibility of obtaining such accommodations if religious belief changes.

What is at stake is something ontological, an aspect of religion as such and independent of *any* social arrangement. The ontological status of religion is the second broad ground on which the theological anti-accommodationist position rests. Here the State is just irrelevant to religion. The State is a way in which we and some of our sisters and brothers organize ourselves to accomplish some goals. But it operates in an entirely different domain from religion; there are no points of contact between the domains of religion and government that are of interest to religion.¹⁸ Of course this is not to say that the State's coercive or seductive power cannot impose itself on *people* who hold religious beliefs. Rather, the point here is that doing things to people cannot do anything to religion.¹⁹

For me, the most developed articulation of this position is Stanley Hauerwas's celebrated essay, *A Christian Critique of Christian America*.²⁰ Hauerwas describes school prayer, the focus of his essay, as "theologically a scandal"²¹ because state-sponsored prayer "cannot help but give the impression that the State is friendly toward religion,"²² and that impression is false. Hauerwas contrasted his position with that of his friend John Howard Yoder, a Mennonite who drew from his denomination's historical experience the lesson that one could seek accommodations and accept them when offered, albeit always aware that the accommodations tendered by the State would never be sufficient to satisfy the demands religion can place on believers.²³ As Hauerwas put it, Yoder would allow for a pragmatic, case-by-case judgment about whether to use the State's language

17. A careful analysis is Elizabeth Harmer-Dionne, Note, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy As a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295 (1998).

18. I am fond of citing James Madison's *Memorial and Remonstrance* in support of this proposition, although I acknowledge that my reading of Madison may not be faithful to Madison's own understanding. Madison wrote, "It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society." JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments* § 1, in THE COMPLETE MADISON 300 (Saul K. Padover ed., 1953) (emphasis added) (originally published 1785).

19. This is true even when the State's view of the matter is that it is doing things to people because of their religious beliefs or practices.

20. Stanley Hauerwas, *A Christian Critique of Christian America*, in RELIGION, MORALITY, AND THE LAW 110 (J. Roland Pennock & John W. Chapman eds., 1988).

21. *Id.* at 111.

22. *Id.*

23. See *id.* at 121-26.

against it.²⁴ Hauerwas thought this insufficiently strenuous.²⁵ I take Hauerwas's position to be that a believer can accept accommodations when they are offered, but ought not ask for them. It is up to the State, not the believers, to decide how to deal with believers: Believers should not place themselves in the position of supplicants seeking the State's permission to do something their religion requires of them no matter what.

Now I depart from what Hauerwas expressly wrote. I would put the point in this way: The State is hostile or unfriendly to religion in its very essence because religion and the State deal with two entirely separate domains. Believers who delude themselves into thinking that the State might be friendly to them commit themselves to operating in the State's domain when their belief ought to commit them to operating only in religion's domain. They may accept accommodations when offered, for there the State comes forward and, one might say, places itself within religion's domain. But seeking an accommodation moves the believer in the wrong direction, into the State's domain.²⁶

What should be done when the believer is placed in the State's domain? This is the situation in the *Mozert*²⁷ and *Amos*²⁸ cases. In the former, parents of children attending public schools found some course material inconsistent with their religious beliefs, and asked the school to allow their children to substitute equivalent material;²⁹ in the latter, the church was sued for discrimination and interposed a defense, relying on a statute that it said should be interpreted to accommodate the religious discrimination in which it concededly engaged.³⁰ I suggest that in both cases, the believers should in fact forgo the opportunity to seek accommodations from institutions that might grant them if requested.

Consider *Mozert* first. Professor Carter refers sympathetically to the parents. They do have an alternative to seeking an accommodation, of course: They can withdraw their children from the public schools and educate them in private, religiously affiliated schools or at home. Their children may avoid the material that troubled the parents as long as the private school or home-schooling satisfies the State's regulatory demands. Of course, the parents would have to bear the costs of private education or

24. See *id.*

25. See *id.*

26. In this connection I have some concern about Professor Carter's tone in discussing public aid to non-public education. Consistent with my general view, I would be troubled by efforts by religiously affiliated schools to obtain such aid. I also doubt that it is possible to create any aid program without leading such schools to make active efforts to get what they can from existing appropriations and to increase the appropriations for the program, efforts which would trouble me.

27. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

28. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

29. See *Mozert*, 827 F.2d at 1060.

30. See *Amos*, 483 U.S. at 331.

home-schooling. But they thereby protect their religious beliefs and practices without conceding authority over such beliefs to the State. As I have said, at some point the accommodation will break down: The State will prescribe a curriculum that the believers simply cannot provide, or will impose certification requirements on teachers or parents that themselves conflict with the demands of religion. And then believers will indeed face fundamental choices. Yet, although the choices are fundamental, they need not, and for believers should not, be hard ones: The State's regulatory demands are to be resisted.

Amos presents a slight variant. There the State had in fact enacted a statutory accommodation.³¹ I have suggested that the theological concerns I am describing would bar people from seeking accommodations but not from accepting them when offered. But what precisely is offered? That is a question of statutory interpretation. The statute in *Amos* allowed religious institutions to discriminate on the basis of religion. The issue in the case was whether that accommodation was available when the discrimination occurred in the operation of a non-religious, non-profit church activity (running a gymnasium).³² The complainant had a fair argument that the accommodation should extend only to religious activities by the protected institutions. Does it move the church on to the State's domain for its lawyers to argue that the accommodation, properly interpreted, authorizes an exemption for the gymnasium's employment practices as well?

I am inclined to think that it does, though that is a very strong position. One might distinguish between saying to the courts that the statute does not in fact reach the gymnasium's employment practices—that is, saying that the legislature *has already* accommodated the church's beliefs—and asking the courts to provide an accommodation. On the former understanding, the church is asking no one for an accommodation but is merely accepting the one the legislature offered, whereas on the latter, it is asking the State, through its judicial branch, for an accommodation. But this distinction seems too thin to me. If the statute is not transparent, as it was not in *Amos*, the church is asking the Court—again, an arm of the State—to interpret the statute. And, I believe, the theological difficulty arises from operating in the State's domain.

What would it mean to say that defending against the discrimination claim in *Amos* by asking the courts to choose between alternative reasonable interpretations of the statutory accommodation was a theological error? Consider the outcome. The complainant files suit, the church effectively refuses to defend because it forgoes the only defense available to it, a default judgment is entered, *Amos* seeks enforcement, the church again does nothing, the State levies on church property, and so on—to the

31. See *id.*

32. See *id.* at 330-31.

point when there is a real crisis between the church and the State. The key point to note here, to which Professor Carter alludes, is that there is nothing theologically objectionable about such crises in themselves. Indeed, this sort of crisis is familiar in the history of denominations such as the Mennonites. Members of those denominations have made it quite clear that when a crisis such as this arises, their religion requires that they go their own way, sometimes literally so. Such crises are not theologically interesting to believers. Rather, they put the question to the State: What do you truly want to do? And that is precisely the point. Accommodations are something for the State to decide. Religious believers are no more than observers of the State's decisions within its domain; they are sovereign in their own, or, more precisely, are subjects of the Sovereign they acknowledge.

I must acknowledge that the position I have sketched here may sound like a celebration of religious oppression, but it is not. Nor is it really a celebration of martyrdom.³³ I celebrate neither oppression nor martyrdom, but I do not expect oppression to disappear either, and so do not expect martyrdom to disappear. Accommodations of religion make it easy to overlook the fact that oppression is a brute fact about the pre-millennial world. To acknowledge this is to take a strong position, one that many will find difficult to sustain. It is far easier to hold out the hope that the State will be friendly for long enough, and over enough matters, to let us live our lives peacefully. And it will be—for some of us. But not for all. Those who are temporarily the State's friends need to see that there are, right now, some to whom the State is no friend at all.

And even those to whom the State is presently friendly should know that they *will* be disappointed in the State someday. The question is not when disappointment will occur, but when believers will understand that disappointment is inevitable.³⁴ The theologically based anti-accommodationist position I have sketched, and to which Professor Carter appears to adhere, either makes that inevitability apparent or forces those who do not yet acknowledge it to confront the proposition of inevitability. And, in the end, that is all to the good. For, to adapt a phrase from

33. Professor Carter's "sneaking" admiration for Bob Jones University does, I think, praise martyrdom as such. I would not. As I understand them, Professor Carter's religious beliefs lead him to conclude that the beliefs of those who control Bob Jones University are false, though sincerely held and religious. But I do not see why one should have even a sneaking admiration for those who act on false religious beliefs. It is one thing to be a martyr for the true religion; it is another to be a martyr for a false one. Believers must be able to draw *that* distinction.

34. I am reminded here of a character's observation near the conclusion of François Truffaut's film *Mississippi Mermaid* (United Artists & Les Films Du Carrosse 1969), that she never knew that love could be so painful. So too with religion.

Senator Daniel Moynihan, to be a believer is always to have your heart broken by the State.³⁵

35. It is perhaps worth noting one partial remedy: a substantial restriction in the State's regulatory and directive activities, of the sort desired by strong libertarians. Professor Carter's proposition, that we are who we are, seems to me a near-conclusive response to the libertarian program, except to the extent that it does not fully take into account the fact that we can change who we are, albeit slowly.